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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ALFRED FANELLI,

Defendant and Appellant.

D052636

(Super. Ct. No. FV1022474)

APPEAL from a judgment of the Superior Court of San Bernardino, Margaret A. Powers, Judge. Affirmed.

A jury convicted Michael Alfred Fanelli of attempted voluntary manslaughter (Pen. Code,<sup>1</sup> §§ 664/192, subd. (a); count 1) and assault with a firearm (§ 245, subd. (a)(2); count 2). The jury also found true allegations that Fanelli personally used a firearm (§ 12022.5, subd. (a)) and personally caused great bodily injury to the victim (§ 12022.7, subd. (a)) during the commission of the crimes. Fanelli further admitted a

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

prior conviction for assault with a firearm, which constituted both a serious felony conviction under section 667, subdivision (a)(1) and a strike under the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12), and that he had served a prior prison term for that conviction as well as serving a separate prison term for a felony drug conviction.

The trial court sentenced Fanelli to prison for a total term of 30 years, consisting of the upper term of five and a half years for the count 1 attempted voluntary manslaughter, doubled under the three strikes law, plus consecutive terms of three years for the great bodily injury enhancement, the upper term of 10 years for the firearm use enhancement, five years for the prior serious felony, and another year for a prior prison term.

In an earlier appeal, Fanelli argued his convictions must be reversed because the court erred by admitting into evidence his allegedly involuntary pretrial statements, in failing to impose discovery sanctions on the prosecution for untimely disclosure, and in permitting him to be impeached with his prior firearm assault conviction. Fanelli also asserted his sentence must be reversed because the court imposed upper terms in violation of his constitutional rights under *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*). We concluded that Fanelli's challenges to his convictions were without merit, but that his sentence was constitutionally flawed. We thus affirmed his convictions, vacated the sentence and remanded for resentencing.

On remand, the trial court again sentenced Fanelli to a total term of 30 years, which included the imposition of upper terms for the count 1 attempted voluntary manslaughter offense and the firearm use enhancement. In this appeal, Fanelli contends

the court again violated his constitutional rights under *Cunningham* and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) by imposing those upper terms. He specifically argues the court's stated reasons for imposing the upper terms were not properly found by the jury or supported by evidence, and constituted an unlawful dual use of the facts. We conclude otherwise and affirm.

## PERTINENT BACKGROUND<sup>2</sup>

When the matter on remand was calendared for resentencing, the trial court on its own motion continued it several weeks to obtain a transcript of the earlier proceedings to consider in light of this court's opinion on the first appeal. At the continued hearing, Fanelli's counsel noted he had just received the supplemental probation report and objected that given the nature of the sentencing laws and Fanelli's due process rights, he should be given more time to prepare and be apprised of the possible aggravating terms that the court might use so that he could address them. Counsel did not believe that the mere discussion in court would satisfy notice for due process purposes, but rather wanted written notice of what factor or factors the court would be relying upon to aggravate Fanelli's sentence.

Noting it also had just received the supplemental probation report, the court, replied that it thought counsel was looking for an indicated sentence and that it would be "looking at the defendant's lack of remorse, the increase in seriousness of his crimes over

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<sup>2</sup> We have granted Fanelli's unopposed motion for judicial notice of the record in his first appeal in this case (D050425), including our earlier unpublished opinion, which contains details of the trial proceedings and the facts of the crimes for which he was convicted. We thus need not repeat those details and facts here.

a period of time, and his continuing criminality[, in addition to] any factors in the probation report." The court again continued the matter for another week, stating it would be very helpful to have written statements from counsel regarding what they thought were the aggravating and mitigating facts in this case.

On February 22, 2008, after the court was provided the parties' statements in mitigation and aggravation, Fanelli's counsel made a motion based on *Blakely* and *Cunningham* to have "a jury trial for any and all factors in aggravation or mitigation that this Court might use in determining the appropriate sentence for him." The prosecutor argued there were sufficient aggravating facts in the trial transcript and Fanelli's prior criminal record to properly resentence Fanelli to upper terms without a jury trial.

The sentencing judge noted that although certain factors might require a jury trial under *Cunningham*, she did have evidence that Fanelli "was on probation at the time that he committed the offenses, and I don't think a jury had to find that factor." The judge stated it had evidence of that fact "in front of it." The judge also commented that she had "not seen any remorse shown by the defendant . . . in his statements to probation, . . . which wouldn't have been something the jury would know about. [¶] And because of those factors, of course the fact that there's a strike prior does prohibit probation. So the Court will not consider probation. And the fact that the defendant was on [probation] at the time of the offense[s] will be used as one of the factors the Court is considering in determining if the aggravated term is appropriate." The judge reviewed the factors cited by Fanelli's counsel in mitigation and found that they were not "mitigating overall," but

even considering all of them, the aggravated sentence was the most appropriate in this case.

Defense counsel objected to the court's use of the lack of remorse as an aggravating factor because Fanelli had consistently maintained that he did not commit these crimes. As to the court using Fanelli's increasing criminality to impose an aggravated term, counsel argued he only had three prior convictions before this case, with the latter two being drug offenses committed due to his illness of substance abuse or economic necessity while the prior assault with a firearm was the same as the crimes in this case so that there was really no increase in criminality. Regarding Fanelli's probationary status, counsel stated, "I'm not sure actually the record shows that. The record does show in the original probation report that Mr. Fanelli was placed on probation several months before this incident. It doesn't indicate probation was terminated in any way, and it doesn't show probation existed at the time of this offense. It doesn't show anything that happened other than what the original sentence was."

The prosecutor disagreed, specifically outlining Fanelli's past convictions, placements on parole and violations, and the fact that even though parole had terminated by operation of law on the earlier firearm assault case, Fanelli was still on felony probation out of San Bernardino and Los Angeles counties at the time he committed the current offenses which were more serious than his earlier crimes. The prosecutor argued that only one aggravating circumstance need be found for count 1, such as "unsuccessful on probation, parole, increase criminality, danger to society," and a different aggravating circumstance for the firearm enhancement, which he suggested "could be the defendant's

admission of the prior. . . ." Fanelli's counsel objected to this latter reason as an improper dual use of facts as that prior had already been used as a strike and a violent felony and for showing increased criminality.

The court agreed it could not dual use the earlier prior to aggravate the term for use of a firearm, but believed it could "safely use the fact that the firearm was not just used, but actually fired in anger at somebody. That is shown by the facts, and the jury found that." The court then imposed the aggregate term of 30 years for Fanelli's offenses and enhancements.<sup>3</sup>

## DISCUSSION

On this appeal after resentencing, Fanelli again challenges the trial court's imposition of the upper terms for the count 1 attempted voluntary manslaughter offense and its attendant firearm use enhancement under section 12022.5, subdivision (a). With regard to the upper term for count 1, Fanelli specifically argues there was insufficient evidence about his probationary status to justify the court's use of such for aggravating his sentence, that use of his probationary status was an improper dual use of facts and that reliance on his probationary status and his lack of remorse to impose the upper term on count 1 violated the holdings of *Blakely* and *Cunningham*. Alternatively, Fanelli argues the recent decision in *People v. Towne* (2008) 44 Cal.4th 63 (*Towne*), which he admits

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<sup>3</sup> A week later, the resentencing judge and parties again appeared in court to correct a clerical error in the initial sentencing which apparently had imposed another year for a prison prior based on the 1993 strike and five-year prior. The court struck that prison prior, which would have given Fanelli 31 years, and amended the sentence so that it only imposed the second prison prior, the felony drug conviction in 2002 in San Bernardino County, for a total of 30 years.

permits a trial court to constitutionally impose an upper term based on a defendant's probationary status, was wrongly decided.

As for the upper 10-year term for his firearm use, Fanelli argues that even though he did not object to the court's stated reason for imposing such aggravated term, his challenge to the court's reasoning is not waived because his defense counsel was not given notice that the court would use the firing of the gun to justify the upper term for the enhancement. As for the reason itself, Fanelli claims it was improper because it is subsumed within the meaning of the Penal Code section, which does not suggest that the shooting of a gun is any worse than just displaying a gun or using it to strike a person.

We conclude that the resentencing judge properly imposed an upper term on count 1 and that Fanelli has forfeited his right to complain about the judge's reason for imposing the aggravated term for the firearm enhancement on resentencing.

As the parties recognize, the United States Supreme Court in *Cunningham* determined that that portion of the California Determinate Sentencing Law (DSL) permitting a court to impose an upper term sentence based on aggravating facts not found true by a jury or beyond a reasonable doubt is unconstitutional and violates the holdings in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Blakely, supra*, 542 U.S. 296 and *United States v. Booker* (2005) 543 U.S. 220 (*Booker*). In so holding, the court in *Cunningham* overruled *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), stating: "Contrary to the *Black* [*I*] court's holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts

permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham, supra*, 549 U.S. at p. 293, fn. omitted.) The high court again reaffirmed *Apprendi's* bright-line rule, that had been reiterated in both *Blakely* and *Booker*, that "[e]xcept for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [Citation.]" (*Cunningham, supra*, 549 U.S. at pp. 288-289.)

During the pendency of the first appeal in this case, our Supreme Court decided *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), in which it reconsidered its holding in *Black I* in light of the *Cunningham* decision, concluding that the existence of "a single aggravating circumstance" renders a defendant eligible for the upper term, thus making the upper term the "statutory maximum" in cases where at least one aggravating fact has been shown in a manner consistent with the requirements of the Sixth Amendment. (*Black II, supra*, 41 Cal.4th at p. 813.) The court specifically stated that "as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Black II, supra*, 41 Cal.4th at p. 812.)

Recently, in *Towne, supra*, 44 Cal.4th at pages 76 through 81, our Supreme Court examined various recidivism-related factors that permitted trial court's to impose terms above the statutory maximum if the defendant had served a prior prison term, if the



defendant had been on probation or parole when the crime was committed, or if the defendant's prior performance on probation or parole had been unsatisfactory. (*Ibid.*)

The court in *Towne* held that the Sixth Amendment right to a jury trial does not apply to the factors that the defendant has served a prior prison term, that the defendant was on probation or parole when the crime was committed, or that the defendant committed new crimes resulting in conviction while on probation or parole. (*Id.* at pp. 81-82.)

Here, contrary to Fanelli's assertion there was no evidence in the record concerning his probationary status to enable the court to use that factor in aggravating count 1, the record clearly shows the court reviewed all the earlier proceedings, which included the original probation report, in addition to the supplemental probation report for purposes of resentencing, noting Fanelli was placed on 36 months probation on February 24, 2005, for a possession of cocaine base for sale conviction. Because the instant crimes occurred on September 6, 2005, and 36 months had not yet passed, Fanelli was necessarily still on probation when he committed the instant crimes. Therefore, the court could use such fact as a reason for aggravating his term for the attempted voluntary manslaughter conviction without having a jury trial on that fact. (*Towne, supra*, 44 Cal.4th at pp. 81-82.) Consequently, the trial court's reliance on Fanelli's probationary status in his criminal history was a valid circumstance that rendered him eligible for the upper term with regard to the attempted voluntary manslaughter conviction in accordance with the requirements of *Apprendi, supra*, 530 U.S. 466 and its progeny, which includes

the "*Almendarez-Torres*<sup>4</sup> [recidivism] exception" to *Blakely/Cunningham* claims (see *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1514; *Black II*, *supra*, 41 Cal.4th at p. 812).

Further, the use of such probationary fact was not a dual use of facts because the record reveals it was not based on Fanelli's prior firearm assault conviction for which he had suffered the strike finding, the serious felony finding, or an enhancement for a prison term as Fanelli claims. Nor do we find any reason to entertain Fanelli's claim that *Towne* was wrongly decided regarding a defendant's probationary status and should not be followed because the United States Supreme Court has not yet determined the exact issue of whether such status fits within the *Almendarez-Torres* exception. Under principles of stare decisis, we are bound to follow the decision in *Towne*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Moreover, because the sentencing court's comments revealed it was looking at and relying upon at least one circumstance that rendered Fanelli eligible for the upper term consistent with our Supreme Court's holdings in *Towne*, *supra*, 44 Cal.4th at pages 76 through 81 and *Black II*, *supra*, 41 Cal.4th 799, the court's additional fact finding regarding Fanelli showing no remorse "in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Black II*, *supra*, 41 Cal.4th at p. 812.) Consequently, there was no *Blakely/Cunningham* error in this regard.

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<sup>4</sup> *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*).

As for Fanelli's additional contention the sentencing judge improperly imposed the upper term for his section 12022.5 firearm use enhancement, as noted above, he has forfeited such issue on appeal because he failed to specifically object below to the judge's cited reason for imposing that aggravated term. (*People v. Scott* (1994) 9 Cal.4th 331, 349-356.) Fanelli's claim of having no notice that the court would use such fact, one concerning the crime, is unavailing on this record.

This matter was remanded for resentencing after we found *Blakely/Cunningham* error on the first appeal. Such put defendant and his counsel on notice that factors concerning an upper term would necessarily be reviewed by the resentencing judge to again determine the appropriate sentence, including the possibility of imposing the same upper terms as originally imposed. With such being the focus of the remand, Fanelli's trial counsel specifically sought a statement from the resentencing judge as to the factors she would be considering in imposing any upper terms on resentencing and a continuance to prepare for the issue. As noted in the facts, the judge stated she would be considering lack of Fanelli's remorse, his criminal history and "any factors in the probation report." In both the original and supplemental probation reports, the fact Fanelli used a firearm during the crimes was cited as an aggravating factor as well as the fact that the nature and circumstances of the crimes were serious as compared with other instances of those crimes. At the resentencing hearing, Fanelli's counsel was very vocal in objecting to the court's statement of reasons regarding count 1 and argued against the court using any recidivist reasons for imposing an upper term on the firearm enhancement because such would be a dual use of the facts. In light of this record, counsel would have surely

objected to the court's stated reason for imposing the upper term if he had thought it was an invalid basis for doing so or if he thought he had insufficient notice of that reason. We therefore decline to address the merits of the issue.

In sum, no *Blakely/Cunningham* error on resentencing is shown.

#### DISPOSITION

The judgment is affirmed.

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HUFFMAN, J.

WE CONCUR:

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McCONNELL, P. J.

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McINTYRE, J.